BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TROY J. MOODY	)	
Claimant	)	
V.	)	
	)	
KBW OIL & GAS COMPANY	)	Docket No. 1,061,663
Respondent	)	
AND	)	
	)	
AMERICAN INTERSTATE	)	
INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requests review of Administrative Law Judge John Clark's June 3, 2013 preliminary hearing Order. W. Walter Craig of Derby, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

Claimant sustained work-related injuries on September 23, 2011. Judge Clark authorized Michael Leahy, Psy.D., to treat claimant's psychological problems and provide related medications, and authorized Eric Clarkson, D.O., to treat claimant's physical injuries and provide medication, but noted claimant's need for blood pressure medication was "unauthorized."[1]

The record on appeal is the same as that considered by the administrative law judge and consists of the June 3, 2013 preliminary hearing transcript and exhibits thereto, the June 3, 2013 regular hearing[2] transcript and exhibits thereto, the Weston James Moody June 3, 2013 deposition transcript, the Paul Hardin May 16, 2013 deposition transcript and exhibits thereto, and the Pedro Murati, M.D., May 6, 2013 deposition transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Respondent argues claimant failed to overcome the presumption that its obligation to provide medical treatment terminated when claimant reached maximum medical improvement (MMI), pursuant to K.S.A. 2011 Supp. 44-510h(e). Respondent further asserts that Judge Clark erred by:

---

[1] ALJ Order. A psychologist can not legally prescribe medication.

[2] The preliminary hearing and the regular hearing were held the same day.

- ordering medical treatment for conditions and problems that did not arise out of or in the course of claimant's employment;

- ordering medical treatment in the absence of prevailing factor opinions;

- ordering treatment for claimant's hypertension, contrary to the so-called "heart amendment," K.S.A. 2011 Supp. 44-501(c); and

- ordering psychological treatment in the absence of an opinion that claimant's psychological condition is directly traceable to his injuries.

Respondent requests the Board reverse Judge Clark's Order. Claimant maintains Judge Clark's Order should be affirmed.

The issues are:

1. Given the K.S.A. 2011 Supp. 44-510h(e) presumption that respondent's obligation to provide medical treatment ceases when claimant reaches MMI, does Judge Clark's preliminary hearing order for medical treatment present an appealable issue?

2. Is claimant's hypertension treatment excluded by the heart amendment?

3. Did claimant prove his need for medical treatment for physical injuries was due to accidental injury arising out of and in the course of his employment, which includes proof that the accident was the prevailing factor in causing the injury and medical condition?

4. Did claimant prove his need for psychological treatment was due to accidental injury arising out of and in the course of his employment, which includes not only proof that the accident was the prevailing factor in causing the injury and medical condition, but also that he suffered a traumatic neurosis directly traceable to his physical injury?

FINDINGS OF FACT

On September 23, 2011, claimant was struck on the head and left shoulder by a pumping unit while working for respondent. He suffered a traumatic head injury, as well as injuries to his neck, low back, left shoulder and left arm. He received extensive treatment, including neck and left shoulder surgeries, and was presumably released at MMI. He continued to be followed by Eric Clarkson, D.O., for ongoing prescription medication and Michael Leahy, Psy.D., for psychotherapy and prescriptions until April 24, 2013, when respondent discontinued all ongoing medical care.

Claimant has a history of a prior neck injury and psychological issues. Following a September 9, 1999 preliminary hearing in a prior workers compensation claim, Judge Barnes ordered psychological counseling. On January 3, 2000, claimant was seen by Pedro Murati, M.D., who diagnosed him with, *inter alia*, clinical depression. In 2009, claimant suffered a work-related injury to his neck. Claimant had neck surgeries, including a C5-7 fusion. Claimant received treatment for his neck, a shoulder, hypertension, insomnia and depression prior to his September 23, 2011 accidental injury.

On January 3, 2013, claimant was seen at the request of the respondent by David Harris, D.O. Dr. Harris provided claimant with various permanent impairment ratings for his cervical spine, brachial plexus, left shoulder, mild traumatic brain injury and "some mild mood and emotional disorders such as anxiety and what, per his description, may be considered posttraumatic stress disorder . . . ."[3]

On January 29, 2013, claimant was seen at his attorney's request by Dr. Murati. Dr. Murati identified various injuries and resulting permanent impairments. Dr. Murati provided claimant with 15 diagnoses, mostly for physical injuries, but also PTSD and clinical depression. Absent one prior and unrelated diagnosis of low back pain with signs of radiculopathy, Dr. Murati opined that all of claimant's diagnoses were the direct result of his September 23, 2011 work-related injury. Dr. Murati indicated claimant needs ongoing prescription medication for his work-related injuries, specifically Methadone, Percocet and Wellbutrin, and at least yearly follow-up appointments on his neck, upper back, low back, bilateral upper extremities and head.[4]

In addressing prevailing factor, Dr. Murati stated:

> The claimant sustained an accident at work which resulted in bilateral upper extremity pain, neck pain, upper back pain, low back pain, and a head injury. He is a young person. He is a nonsmoker. His hobbies are not known as a direct cause for his current diagnoses. He does have significant pre-existing injuries regarding his low back and neck, however his continuing neck and low back symptoms were controlled prior to this work related injury and he was in his normal state of health and able to perform his job duties. He has significant clinical findings that have given him diagnoses consistent with his described accident at work. Therefore, it is under all reasonable medical certainty and probability, the prevailing factor in the development of his conditions is the accident at work.[5]

---

[3] Hardin Depo., Ex. 3 at 10.

[4] Murati Depo. at 35-36.

[5] Murati Depo., Ex. 2 at 11; see also Murati Depo. at 31-32.

Dr. Murati testified that he does not provide impairment ratings for psychological injuries because he lacks the knowledge to be an expert. Dr. Murati was unaware claimant had received treatment and medication for depression prior to September 23, 2011. When presented with the possibility that claimant had prior psychological treatment, Dr. Murati testified, "Excellent, so let's just say there was an aggravation there."[6]

On April 5, 2013, claimant was seen by Dr. Clarkson for a swollen left arm and neck. Claimant told Dr. Clarkson that he had slammed his left shoulder against the wall the prior evening after dislocating it while rolling over in bed. Dr. Clarkson took an x-ray of his left shoulder, provided a sling and prescribed Percocet.

In a letter dated May 8, 2013, Dr. Leahy stated:

> I have been treating [claimant] for symptoms of anxiety and depression over the past year. These symptoms are a result of a traumatic brain injury and stress related to life style change. The psychotropic med regimens he is currently prescribed I feel are crucial to everyday coping and stabilization.[7]

On May 8, 2013, Dr. Clarkson issued a letter to claimant's attorney listing claimant's diagnoses as osteoarthrosis, hypertension, avascular necrosis mandibula, posttraumatic stress disorder, insomnia, major depressive disorder and chronic pain due to trauma. On May 22, 2013, Dr. Clarkson noted claimant's shoulder was "still very tender due to osteophyte formation from his work injury."[8]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501 provides, in part:

> (c) Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.

K.S.A. 2011 Supp. 44-501b provides, in part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

---

[6] Murati Depo. at 50.

[7] P.H. Trans., Ex. 2 at 1.

[8] P.H. Trans., Ex. 8 at 2.

K.S.A. 2011 Supp. 44-508 provides, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

44-510h states in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

(b)(1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of two health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

(2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

. . .

(e) It is presumed that the employer’s obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments

> thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

ANALYSIS

1. A preliminary order of medical treatment, even after claimant presumably reached MMI, does not present an appealable issue.

The Board's authority to entertain issues following a preliminary hearing is limited. Not every alleged error in law or fact is reviewable. Under K.S.A. 2011 Supp. 44-551 and K.S.A. 2011 Supp. 44-534a, the Board can review allegations that an administrative law judge exceeded his or her jurisdiction, including: (1) whether the worker sustained an accident, repetitive trauma or resulting injury; (2) whether the injury arose out of and in the course of employment; (3) whether the worker provided timely notice; and, (4) whether certain defenses apply. "Certain defenses" refer to defenses which go to the compensability of the injury under the Workers Compensation Act.[9] K.S.A. 2011 Supp. 44-510h(e) does not create an issue going toward compensability or add an issue that the Board may address in a preliminary hearing appeal.

Preliminary hearings are typically not held the same day as a regular hearing. Further, some judges will not have a regular hearing if preliminary matters are pending. However, this Board Member cannot find a statute prohibiting the manner in which Judge Clark has decided to conduct his docket. This issue raised by respondent is not appealable from a preliminary hearing and is dismissed.

2. The heart amendment issue is moot because there was no order for payment of claimant's blood pressure medication.

Both attorneys seemed to guess whether there was an order for respondent to pay for claimant's blood pressure medication.[10] Respondent argues it apparently was ordered to pay for claimant's blood pressure medication as an unauthorized medical expense. Claimant indicated respondent was not ordered to pay for his blood pressure medication. This Board Member concludes respondent was not ordered to provide claimant with blood pressure medication; he simply stated it was "unauthorized," not that it should be paid as unauthorized medical expense. This issue is dismissed.

---

[9] See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 674, 994 P.2d 641 (1999).

[10] See Respondent's Brief (filed June 17, 2013) at 3 and Claimant's Brief (filed June 24, 2013) at 2.

3. Claimant proved his need for medical treatment for his physical injuries was due to accidental injuries that arose out of and in the course of his employment, including that the accident was the prevailing factor in causing his injuries and medical conditions.

Dr. Murati's report and testimony establish the September 23, 2011 accident was the prevailing factor in claimant's physical injuries and need for medical treatment.

It appears respondent terminated conservative treatment after claimant's April 5, 2013 visit to Dr. Clarkson, when claimant divulged that his left shoulder dislocated while turning in bed. The record is silent as to whether this incident was the direct and natural consequence of claimant's September 23, 2011 accidental injury or was an intervening accidental injury sufficient to sever respondent's obligation to provide medical treatment. It is respondent's burden to prove that an intervening accidental injury was the cause of claimant's need for medical treatment to his left shoulder rather than the work-related accident,[11] but there is insufficient proof.

4. Claimant failed to prove his need for psychological treatment was due to accidental injuries arising out of and in the course of his employment, including failing to prove that the accident was the prevailing factor in causing psychological injury and medical condition and that he suffered a traumatic neurosis directly traceable to his physical injury.

Dr. Murati acknowledged lack of expertise in rating psychological conditions. Dr. Murati was unaware of claimant's prior psychological treatment. While Dr. Murati gave a "blanket" opinion that claimant's accident was the prevailing factor in nearly all of claimant's diagnoses, including PTSD and depression, this Board Member cannot conclude such doctor's prevailing factor opinion meets the preponderance of the evidence standard, given Dr. Murati's reluctance in expressing medicolegal opinions concerning psychological issues, as well as his lack of knowledge that claimant had prior mental health treatment. It would seem difficult for Dr. Murati to provide a prevailing factor opinion in the absence of his knowledge of other factors, such as claimant's preexisting treatment for depression.

Dr. Leahy's indication that claimant's anxiety and depression symptoms are "a result" of a traumatic brain injury and stress associated with lifestyle change is insufficient to prove claimant's accident was the prevailing factor in his psychological injury and need for mental health treatment. The prevailing factor legal standard requires proof of "the" primary factor in relation to all other factors, not "a" resulting effect.

---

[11] See *Garrity v. Bridges*, No. 1,052,823, 2012 WL 4763682 (Kan. WCAB Sep. 28, 2012) and *Desautel v. Mobile Manor Inc.*, Nos. 262,971 & 262,972, 2002 WL 31103972 (Kan. WCAB Aug. 29, 2002).

Claimant presented no proof that his current need for psychological treatment is the direct result of his September 23, 2011 physical injury, as required by case law.[12] At this juncture of the case, claimant failed to prove the required elements for a compensable psychological injury.

CONCLUSIONS

WHEREFORE, after reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member: (1) affirms the June 3, 2013 preliminary hearing Order concerning treatment with Dr. Clarkson; (2) reverses the ruling regarding treatment with Dr. Leahy; (3) dismisses respondent's appeal on the K.S.A. 2011 Supp. 44-510h(e) issue; and (4) dismisses the issue concerning blood pressure medication as moot.[13]

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: W. Walter Craig
walter@griffithlaw.kscoxmail.com

Terry J. Torline
tjtorline@martinpringle.com
dltweedy@martinpringle.com

Honorable John Clark

[12] See *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 400, 771 P.2d 557, 559 (1989).

[13] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.